

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

December 16, 1997

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**No. 96-3363-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**JAMES E. GRAY,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and orders of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. James E. Gray appeals from a judgment of conviction entered after a jury found him guilty of attempt to obtain a controlled substance by misrepresentation, as a party to a crime and as a habitual criminal, contrary to §§ 161.43(1)(a)(2) and 161.16(2)(a)(7), STATS., 1993-94, and

§§ 939.05 and 939.62, STATS.<sup>1</sup> Gray also appeals from the orders denying, in part, his postconviction motion for relief. Gray claims that the trial court: (1) erroneously exercised its discretion by admitting other-acts evidence which he claims was irrelevant and prejudicial because there was insufficient evidence that Gray committed the other acts; and (2) improperly modified the conditions of his probation to include a one-year jail term. We conclude that Gray has partially waived his right to object to the other-acts evidence, and that to the extent he has preserved his objection, the other-acts evidence was properly admitted. We also conclude that the trial court properly exercised its discretion when it modified the conditions of Gray's probation. Therefore, we affirm.

#### I. BACKGROUND.

On January 25, 1995, a criminal complaint was filed against James Edward Gray, charging him with two counts of obtaining a controlled substance by fraud, as a party to a crime and as a habitual offender. Count one involved a prescription refill on September 26, 1994, for Hydrocodone for a person named Sheree Sanders.<sup>2</sup> Count two involved a prescription filled on July 21, 1994, for Hycodan syrup for a person named Glenda Johnson.<sup>3</sup> Following a preliminary hearing, the felony complaint encompassing counts one and two was consolidated

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<sup>1</sup> The jury also convicted Gray of one count of obtaining a controlled substance by misrepresentation, and of one count of attempt to obtain a controlled substance by misrepresentation, as a misdemeanor. However, in an order partially granting Gray's postconviction motion, the trial court dismissed the former count with prejudice and ordered a retrial on the latter. Therefore, Gray does not appeal from the judgment of conviction with respect to either of these counts.

<sup>2</sup> Hydrocodone is a narcotic compound listed as a Schedule II controlled substance in § 161.16(2)7, STATS., 1993-94.

<sup>3</sup> Hycodan syrup is a syrup form of a drug which contains the same narcotic compound as Hydrocodone.

with a misdemeanor complaint (count three) alleging an attempt to obtain a controlled substance by misrepresentation.

On May 16, 1995, the jury trial began. Before the jury was chosen, the State brought a motion to introduce other-acts evidence, specifically, the State wished to introduce six uncharged offenses of prescription forgery and Gray's prior conviction involving a forged prescription. All of the uncharged offenses involved prescriptions for Hydrocodone or Hycodan syrup. The prior conviction involved a prescription for "tussend liquid." The trial court granted the State's motion, and ruled that the other-acts evidence would be admissible at trial.

At trial, a pharmacist testified that his pharmacy had received the prescriptions relating to the uncharged offenses. The defense made a general relevance objection, which was overruled. Later, a document examiner testified concerning his examination of the uncharged other-acts prescriptions, and testified as to the results of a handwriting and fingerprint analysis of the prescriptions. The document examiner testified that there was a "high probability" that the same person wrote the printed portion of all of the charged and uncharged prescriptions; but that he could only conclude that Gray "may or may not" have written the uncharged prescriptions. Gray did not object or move to strike the document examiner's testimony.

At the close of the trial, the jury found Gray guilty on all three counts. The trial court then sentenced Gray to three years in prison on count three, consecutive to ten years in prison on count two, and to five years in prison, stayed, with five years of probation, consecutive to counts two and three, on count one. However, after considering Gray's postconviction motion, the trial court dismissed count two with prejudice, and ordered a retrial on count one. Because the order

destroyed the trial court's previous sentencing scheme, the trial court modified Gray's probation to include one year of jail time. Gray now appeals.

## II. ANALYSIS.

### *A. Other-acts evidence.*

Gray claims, for a number of reasons, that the trial court erroneously admitted other-acts evidence, specifically, six uncharged forged prescriptions and one prior conviction for prescription forgery. We conclude that Gray has partially waived his right to object to the other-acts evidence and that to the extent he has preserved his objection, the evidence was properly admitted.

In deciding whether to admit other acts evidence, the trial court must apply a two-part test. *State v. Kuntz*, 160 Wis.2d 722, 746, 467 N.W.2d 531, 540 (1991). First, the trial court must determine whether the evidence is offered for a purpose permissible under RULE 904.04(2), STATS. *Id.* If the trial court finds that it is, the trial court must then determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant. *Id.*; RULE 904.03, STATS.<sup>4</sup> The relevancy of other-acts evidence, however, depends on the fulfillment of a condition of fact; namely, that the defendant committed the other acts. *State v. Schindler*, 146 Wis.2d 47, 52-54, 429 N.W.2d 110, 112-13 (1988). Other-acts evidence is relevant if the trial court concludes, after examining all of the evidence, that a jury could reasonably find,

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<sup>4</sup> RULE 904.03, STATS., provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

by a preponderance of the evidence, that the defendant committed the other acts.  
*Id.*

Gray first argues that the evidence is insufficient for a reasonable jury to conclude, by a preponderance of the evidence, that he committed five of the six uncharged acts of prescription forgery. Gray bases this claim on the fact that the document examiner testified at trial that he could only conclude that Gray may or may not have written the five uncharged prescriptions.

We acknowledge that Gray did make a general relevancy objection to the pharmacist's testimony concerning the uncharged prescriptions, and did object to the trial court's receipt of the exhibits, on relevancy grounds, at the close of the trial. Gray, however, failed to present the trial court with the argument he now makes on appeal—that there was insufficient evidence to prove that he wrote five of the six uncharged prescriptions. After the document examiner testified, Gray did not object or move to strike the testimony on the basis that the State had failed to connect Gray to the uncharged forged prescriptions, or on any other basis. Instead, Gray remained silent, and now argues on appeal, for the first time, that a jury could not reasonably conclude, by a preponderance of the evidence, that he forged the five uncharged prescriptions.

In order to preserve an objection on appeal to the admission of evidence at trial, a party must make a timely objection or motion to strike at trial which states the specific ground for objecting. RULE 901.03(1)(a), STATS. The contemporaneous objection rule advances a number of important objectives, including: (1) enabling the record to be made when witnesses' recollections are freshest; (2) enabling the judge, who has observed the witnesses' demeanors, to make factual determinations; (3) giving the trial court the opportunity to exclude

evidence which might lead to the defendant's acquittal; and (4) encouraging the parties to view the trial as an event of significance that should be kept as error-free as possible. See *State v. Davis*, 199 Wis.2d 513, 517-19, 545 N.W.2d 244, 245-46 (Ct. App. 1996). Therefore, because Gray failed to specifically make a contemporaneous objection or motion to strike, we conclude that Gray has waived his right to argue on appeal that a jury could not conclude, by a preponderance of the evidence, that he committed the five uncharged acts of prescription forgery.

Gray, however, did properly object to the uncharged offenses on general relevance grounds. Therefore, we conclude that he has preserved his right to object to the admission of the uncharged offenses on the basis that: (1) they were not admissible under an exception to RULE 904.04(2), STATS.; and (2) their probative value was substantially outweighed by the danger of unfair prejudice to Gray. Gray does, in fact, make both of these arguments.

Gray first argues that the five uncharged acts of prescription forgery and the one prior conviction for prescription forgery were not admissible under any of the exceptions to RULE 904.04(2), STATS. Pursuant to its ruling admitting the other acts evidence, the trial court found that the evidence was admissible under the exceptions of "identity, plan, proof of motive, scheme and also, potentially, I suppose, absence of mistake, though I don't specifically know what the defense is going to be." We agree with the trial court that, at a minimum, the evidence that Gray previously obtained narcotic drugs through misrepresentation was relevant to show that his motive in the charged case was to satisfy a drug addiction. Therefore, the trial court's ruling was not erroneous.

Finally, Gray claims that the trial court erred by finding that the probative value of the other-acts evidence was not substantially outweighed by the

danger of unfair prejudice to Gray. Gray specifically argues that the danger of confusion of the issues substantially outweighed the other-acts evidence's probative value. Basically, Gray claims that the jury was unable to distinguish between the charged and uncharged prescriptions because of the number and similarity of prescriptions involved.

A trial court's ruling admitting evidence is discretionary, and we will uphold the ruling if we can find a reasonable basis for it. *State v. Plymesser*, 172 Wis.2d 583, 591, 493 N.W.2d 367, 371 (1992). Although Gray's case was complicated and involved a number of separate acts of prescription forgery, we cannot conclude that the danger of confusion was so high that the jury could not have distinguished between the charged and uncharged prescriptions. Additionally, the uncharged prescriptions were probative, and tended to prove, at a minimum, that Gray had a motive to commit the charged acts. The document examiner did testify that there was a "high probability" that one person wrote the printed portions of all of the prescriptions, and one of the uncharged prescriptions was written out for a Glenda Johnson, the same name as that on one of the charged prescriptions. Therefore, the trial court's ruling was not an erroneous exercise of discretion, and the uncharged prescriptions were properly admitted as other-acts evidence.

*B. Modification of probation conditions.*

The jury found Gray guilty of three separate counts. The trial court originally sentenced Gray to thirteen years in prison (three years for count three, consecutive to ten years for count two), followed by five years of probation on count one. The trial court subsequently dismissed count two with prejudice, and granted a new trial on count three. Because those actions frustrated the original

sentencing scheme, the trial court modified Gray's probation to include a one-year jail term. Gray claims that the trial court erred when it modified the conditions of his probation, and argues that: (1) § 973.09(3)(a), STATS., does not authorize modification of the terms of probation prior to the beginning of the probation period; and (2) frustration of the original sentencing scheme does not constitute "cause" under § 973.09(3)(a). We disagree.

Construction of a statute involves a question of law, which we consider *de novo*. *State v. Dean*, 163 Wis.2d 503, 510, 471 N.W.2d 310, 313 (Ct. App. 1991). The primary source for the construction of a statute is the language of the statute itself. *Id.* When the statutory language is clear and unambiguous, we arrive at the intention of the legislature by giving the language its ordinary and accepted meaning. *Id.*

Section 973.09(3)(a), STATS., provides: "Prior to the expiration of any probation period, the court, for cause and by order, may extend probation for a stated period or modify the terms and conditions thereof." The statute clearly and unambiguously states that it applies "prior to the expiration of any probation period." The statute does not state that it does not apply "prior to the beginning of any probationary period." Therefore, we decline to rewrite the statute, and conclude that § 973.09(3)(a) did authorize the trial court to modify the terms of Gray's probation prior to the beginning of the probation period.

Gray also claims that the frustration of the trial court's sentencing scheme, as a result of its dismissal of one count and retrial of another count, could not constitute "cause" as the term is used in § 973.09(3)(a), STATS. Gray cites no legal authority in support of his argument. Instead, he merely claims that "it is illogical to find cause for modification when the defendant has not done anything

to justify it.” We are not persuaded. To the contrary, we conclude that it is perfectly logical to find cause for modification when the original sentencing scheme has been destroyed by a subsequent trial court order. Therefore, we conclude that the trial court acted properly when it modified Gray’s probation to include one year of jail time.

*By the Court.*—Judgment and orders affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

